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IN THE MATTER OF:	*	
	*	
Douglas D. Stevens	*	
Claimant	*	
	*	
against	*	Case No.: 1999-LHC-1732
	*	
General Dynamics Corporation	*	OWCP No.: 1-121315
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs U.S. Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 18, 1999 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 17	Attorney Kelly's letter filing her	12/16/99
CX 18	Fee Petition	12/16/99
RX 21	Employer's letter filing no objections thereto	12/16/99

The record was closed on December 16, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On September 21, 1991, Claimant suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. The parties attended an informal conference on April 29, 1999.

6. The applicable average weekly wage is $574.33.

7. The Employer voluntarily and without an award has paid temporary total compensation for various periods of time and temporary partial from September 11, 1997(?) through the present at various compensation rates based on his post-injury wages. Compensation and medical benefits paid thus far total $39,340.17 and $57,728.88, respectively.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Douglas D. Stevens ("Claimant" herein), forty-four (44) years of age, with a high school education and an employment history of manual labor, began working on April 8, 1980 as a sheet metal worker at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. His primary duties involved installation of ventilation overheard on the boats and he daily had to climb up/down four or five levels of ladders and stairs to reach his work site, while carrying his tool bag weighing about twenty-five (25) pounds. He often had to work in "very tight quarters," in awkward positions, and he sometimes had to use "very extreme" twisting motions to enter and exit those confining spaces. He has worked all over the boats and he has sustained a number of back injuries at the shipyard. (TR 18-21; RX 19)

Claimant's medical records can best be summarized by Dr. Bertram Silverstone, a neurologist, who stated as follows in his September 25, 1991 report (RX 7 at 14):

> Mr. Stevens is a 35 year old man upon whom I operated on December 13, 1985 for a herniated intervertebral disc at L4-5, bilaterally and midline. Pain was primarily on the left side at that time. A lumbar laminectomy was done with excision of the herniated intervertebral disc at L4-5 bilaterally and midline with a negative exploration at L5-S1. The patient made a good recovery and when last seen May 17, 1989 he was doing well. He was working full time without problems and was given an appointment for six months but he was instructed to cancel the appointment if he was free of symptoms at that time. He was advised that in the event of a return of back pain on prolonged sitting, he could consult Dr. David Siciliano who might be able to help him by means of manipulation. For the most part I noted that he was symptom free.
>
> Beginning about three months ago, Mr. Stevens began to have pain in the midline of the low back. It was like "a tooth ache" and was present virtually all the time. At times, he could relieve it by an ice pack and then he was all right for a time. He continued to be troubled by this problem until early Saturday morning, four days ago, when he became very much worse with severe back pain and spine radiating into the upper part of the left thigh posteriorly and post remedially. He was virtually unable to walk or do anything else requiring standing. He was well enough to go to the emergency room at Westerly Hospital two days later, when he was given a muscle relaxant and Motrin but he had to give these up because they upset his stomach. Meanwhile, he is a little better but is still having a good deal of pain and consults me

today for a further evaluation.

Dr. Silverstone, who has treated Claimant since at least December 3, 1985 (RX 7 at 1), concluded as follows (RX 7 at 15):

> IMPRESSION: The recent history suggests a recurrence of radiculopathy either L5 or S1 on the left side. However, there are no significant confirmatory findings. This patient is known to be a serious man who gives an accurate history. Accordingly with symptoms of this severity, investigation is desirable. I should like to have an MRI of the lumbar spine and an EMG of both lower limbs. Meanwhile I shall prescribe back exercises and will plan to see him as soon as the studies are done.

Dr. Silverstone referred Claimant to Dr. M. Howard Triedman, also a neurologist, and the doctor states as follows in his October 21, 1991 letter to Dr. Silverstone (ALX EX 6):

> The patient has had an injury at work in September of 1984. At that time he was doing some heavy lifting and noted the onset of back and left lower extremity pain. The pain was severe and required surgery in December of 1984. He says that he had really essentially complete relief of pain at that time. He returned to work following surgery and has continued to do well until probably four to five months ago. Beginning four of five months ago he noted a discomforture in the low back. This was described as a toothache and has been a constant problem for him. He noted some increasing pain with lifting at work. More recently he has noted the development of severe pain extending from the region of the left coccyx into the left buttock, the postural lateral aspect of the left leg, and down the posterior aspect of the left foreleg as well. He said that the pain became intense and resulted in a neurosurgical evaluation. His general health has been otherwise excellent.

Dr. Triedman concluded as follows **(Id)**:

> The results of the EMG study can be summarized as follows.
>
> The L4 nerve roots are intact. There is a minor change noted in the L5 nerve roots bilaterally, left somewhat more than right. However, the general appearance of this change suggests predominantly a residual process.
>
> There are some minor changes noted in S1 nerve root distribution as well, right more than left. Again, the

changes are not prominent and suggest mainly a residual nerve process.

It seems almost certain that we are dealing with a recurrent radiculopathy. Although, the changes are of a minor character, I suspect that we are dealing with a new and/or recurrent left S1 nerve root irritative process.

In his November 13, 1991 followup report, Dr. Silverstone states as follows (RX 7-18):

Dr. M.H. Triedman did an EMG which was not strongly positive but he thought that there was an S1 left radiculopathy which was quite in keeping with his symptomology. The MRI of 10/21/1 showed some central protrusion at L4-5 and L5-S1 together with degenerative changes.

Symptoms have not changed since I saw him last and he has not been able to return to work. He has found that the use of a back support gives him substantial relief.

I think that it is quite possible that the quickest way to end this man's problems for good might possibly be a back fusion. Accordingly, I am referring him to an orthopedic surgeon, Dr. Edward Spindell for an opinion concerning this point. I should like to discuss the problem with Dr. Spindell after he sees him and will then see Mr. Stevens again.

Additional note: Mr. Stevens is for the present totally disabled from work until further notice.

Dr. Edward Spindell, an orthopedic surgeon, examined claimant on December 3, 1991 and the doctor stated as follows in his report (RX 9-2):

X-RAYS: X-rays of the lumbosacral spine revealed some degenerative changes with mild disc narrowing at L4-5. Disc spaces in general were reasonably well maintained. Vertebrae were of average height and width. There was no evidence of acute bone injury or destructive processes. There appeared to be a surgical complete laminectomy of L4 and L5.

An MRI study of the lumbar spine performed on October 21, 1991 was interpreted by Dr. Ryvicker as showing a central protrusion or herniated at L5-S1 and, to a slightly lesser degree, at L4-5 with degenerative changes. Postoperative fibrous changes were also present.

IMPRESSION: This patient is doing remarkably well at the

present time. He has minimal sequelae from prior lumbar disc surgery consisting of the presence of a lumbar scar without evidence of any acute mechanical or neurological abnormalities.

TREATMENT: I recommended and showed the patient muscle strengthening exercises. I encouraged him to continue with his swimming and walking. I advised him to resume work, not requiring heavy lifting or excessive and repetitive bending and to utilize a lumbosacral support during the working hours only.

PROGNOSIS: I believe his overall prognosis is good and I agreed to reevaluate him in about four weeks.

CAUSAL RELATIONSHIP: The history and physical findings appear directly related to his original injury and surgery of 1985, aggravated by a recent lifting incident of September 20, 1991.

On December 10, 1991 (RX 3) Claimant was released to return to work with restrictions against heavy lifting (above 35 pounds) and excessive and repetitive bending. The Employer was able to provide such work and Dr. Spindell states as follows in his May 28, 1992 letter to the Employer (RX 9-6):

Patient still has intermittent low back and left leg pain extending posteriorly to his calf. He has no gastrointestinal or genitourinary difficulties. He says that he is better with his lumbosacral support.

Examination is quite good with forward flexion to 90○ and no acute mechanical findings in the low back and no acute neurological abnormalities.

X-rays taken today of the lumbosacral spine revealed mild degenerative disc narrowing at L4-5 and L5-S1. There is evidence of a decompressive laminectomy of L4 and L5. X-rays of the left hip were within normal limits.

As I had stated in the past he did have an MRI study of his lumbosacral spine performed at Miriam Hospital in October, 1991 showing a combination of central disc protrusion or herniation as well as degenerative changes with some postoperative fibrous reaction at L4-5 and, to a lesser extent, at L5-S1.

The patient is not interested in any further surgery. I advised him to continue with his exercise regimen and with his work activity, avoiding heavy lifting, excessive and repetitive bending and climbing.

Dr. Spindell continued to see Claimant as needed on September 1, 1992 (RX 9-7) on October 22, 1992 (RX 9-8), on December 1, 1992 (RX 9-9) and on March 4, 1993 the doctor reported as follows (RX 9-10):

> Examination shows a well-healed lumbar scar with forward flexion to 80○. There is mild rigidity of the lumbar spine and some local tenderness but no spasm or tilt. Straight-leg raising is present to 80○ with the patient complaining or pulling and tightness in his low back. No acute neurological deficit.
>
> X-rays of the lumbosacral spine show a well-defined decompressive laminectomy overlying the L4 and L5 levels with no evidence of acute bone injury or destructive processes. Joint spaces are still well maintained.
>
> Patient was advised to continue with full-time employment on a restricted basis avoiding heavy lifting, excessive and repetitive bending, climbing, continuous and prolonged sitting and standing and exposure to a cold and damp environment.

Dr. Spindell continued to see Claimant as needed between May 3, 1993 and November 30, 1995 (RX 9-13 through RX 9-30).

Claimant continued to experience flare-up of low back pain and Dr. Daniel Gaccione states as follows in his March 20, 1996 office note (CX 4):

> Douglas Stevens returns for follow up for his chronic back pain. He is getting some relief with his 10's (TENS) unit but otherwise he continues to have pain on a daily basis which he rates at 7 out of 10. He is much more comfortable sleeping in the fetal position - no bladder complaints or significant motor difficulties.
>
> Exam: No notable changes in his exam from last month. He still has full motor strength and a symmetrical sensory and reflex exam.
>
> X-rays were taken today with flexion and extension views- he has . . . lothesis at L-5, S-1 with apparent stenosis - otherwise there appears to be no segmental instability.
>
> Impression: Spinal stenosis/degenerative disc disease at L-5, S-1
>
> Plan: 1. Refer to Dr. Hargus for pain evaluation 2. If symptoms persist we will consider spine surgeon evaluation to see if there are any surgical options.

Dr. Stephen B. Gross, an associate of Dr. Gaccione, saw Claimant on May 6, 1996 and the doctor states as follows (**Id**):

> Douglas Stevens is a patient with chronic low back pain followed by Dr. Gaccione - he is back today to state to us once again that his pain is significant and that it is only mildly relieved by a 10's Unit. At this point he is off anti-inflammatory medication and other meds as well. After reviewing Dr. Gaccione's note and his history and current situation I think it is appropriate to refer him to a spine surgeon. We will go ahead and set that up and I anticipate that he will see us back only on a prn basis. (CX 5)

Dr. Michael J. Halpern, an orthopedic surgeon, examined Claimant on May 9, 1996 and the doctor concluded as follows (CX 6):

X-rays of the LS spine, including AP and lateral flexion/extension views, taken over Dr. Gaccione's office reveal that the patient is S/P L4 and L5 total laminectomies. There is no gross instability on lateral flexion/extension x-rays. The vertebral bodies do have a slightly elongated appearance on the lateral view... There are mild osteophytic changes at L4-5 anteriorly. Moderate disc space narrowing at L4-5 and L5-S1.

IMPRESSION: LRPS in a previously operated spine. The patient does not have a true radiculopathy but rather has radiculitis clinically.

RECOMMENDATION: To get an MRI of the lumbar spine to rule out possible recurrent disc herniation. We will have Mr. Stevens return here afterwards.

That diagnostic test was performed on May 13, 1996 and Dr. Kevin L. Quinn reported as follows (ALJ EX 6):

> FINDINGS: The conus appears normal.
>
> L2-3: There is mild decrease in disc height and hydration. Mild broad base disc bulging is evident. Moderate bilateral facet arthropathy is present.
>
> L3-4: Mild bilateral facet arthropathy is present. The disc appears intact.
>
> L4-5: There is mild decrease in disc height and hydration. Mild broad base disc bulging is evident. There is no evidence of residual or recurrent HNP. The patient is status post wide posterior laminectomy.
>
> L5-S1: There is a mild decrease in disc height and

hydration. Moderate left sided disc bulging vs. HNP is present extraforaminal location. This results in some impingement upon the left L5 root. Again, the patient is status post wide laminectomy posteriorly at this level. Significant facet degeneration is present at this level.

IMPRESSION:
1. Post operative changes L4-5 and L5-S1 as above.
2. Disc bulge vs. residual/recurrent HNP in an extra forminal location on the left at L5-S1. Correlate clinically with current symptoms.

Dr. Halperin recommended "a lumbar epidural steroid injection" on May 23, 1996 (CX 6-3) and, as that injection provided "some improvement," the doctor permitted Claimant to return to work with "restrictions for one month and then allow him to return to regular duty." (DX 6-4) The "epidural injection" was prescribed again on July 5, 1996 and the doctor kept "him out of work until the next office visit." (CX 6-5)

On July 26, 1996 Dr. Halperin reported as follows (CX 6-6):

Douglas returns today having his second **lumbar epidural steroid** injection. The first one gave him good relief of pain for approximately 1 week. The second injection gave him no relief at all.

We had a very lengthy discussion about his pain. He finds that his pain has been getting steadily worse since 1991 and he is getting quite frustrated by it. He does not feel capable of doing his regular work because after he goes home he is in severe pain. I told Douglas that at this stage, I believe that he should be able to do some type of work. I filled out a work restriction form for him but also did refer him for a FCE (**i.e.**, a functional capacities evaluation). Because of his continued pain in both legs (left greater than right) we will get an EMG/NCS study just to rule out any possible radiculopathy. His pain is located in the lower back, over both posterior superior iliac spines. It radiates down the left leg to the posterior calf and ankle, and the right leg down to about the knee.

Dr. John Tauro reported that the Claimant's EMGs were "abnormal" and Dr. Halperin, as of August 12, 1996, stated as follows (CX 7-1):

Douglas returns his **EMG/NCS** showed predominantly chronic changes. There was some mild questions of acute changes in the S1 enervated muscles. I spoke to Dr. Tauro about

this. He felt that if there is any acute changes, these are very mild.

The Functional Capacity Evaluation has not returned here yet.

IMPRESSION: Chronic LRPS.

PLAN: At this point, I told Douglas that I do not really have anything further that I can offer him. I do not believe that he is a surgical candidate nor do I recommend any further epidural injections. He has already been through therapy. We discussed referral for another opinion. Douglas will take this under advisement. Work restriction form is filled out today. I await his Functional Capacity Evaluation. We will have him return here prn.

Richard Montgomery, P.T., ATC, CHT, states as follows in his August 8, 1996 report to Dr. Halperin (ALX EX 6):

Doug Stevens was seen for a Functional Ability Indicating Rating FAIR evaluation on August 7, 1996. The purpose of the evaluation was to determine Mr. Stevens' present functional capacities. The following is a summary of the results of the evaluation with the attached report detailing each of the test.

As part of the FAIR evaluation we include pain questionnaires and objective tests to determine how pain is effecting function. Results are compared to observe pain behaviors and movements during the FAIR evaluation to help determine if the patient's description of their pain and disability correlate with the evaluator's clinical assessment of the patient's pain and disability. High scores indicate a lack of correlation. Lack of correlation usually indicates pain/disability exaggeration by the patient. In Mr. Steven's case, he did not score high on any of those tests. Therefore we can say that Mr. Stevens is not showing a tendency towards pain/disability exaggeration at this time.

The results of the static and dynamic tests in regards to functional capacities are outlined on the attached material handling form. His material handling maximum is 40 pounds and he showed difficulty in non-material handling tests, stooping, squatting and in the endurance simulated bench work test. Discussing the work tasks with Mr. Stevens he would appear to have the capacities necessary to return to work in the shop as a sheet metal worker. He would certainly have difficulty and would not be able to work on the boats.

Subjectively, Mr. Stevens states that the most difficult task for him in regards to return to work would be driving to and from. He states that he has a significant increase in his pain while

driving. The ability to change positions at work standing, walking, etc. appear to allow him to be somewhat more comfortable.

Reviewing Mr. Stevens' recent course of physical therapy he states that pelvic traction was not utilized. In light of the apparent compression on the nerves he may be helped by trial of pelvic traction. If the pelvic traction is helpful then a more aggressive therapeutic exercise program could be initiated, according to the doctor.

The Employer referred Claimant for an evaluation by Dr. Philip F. Willetts, Jr., an orthopedic surgeon, and the doctor concluded as follows in his March 7, 1997 report (RX 5-7):

DIAGNOSIS:

1. Chronic low back and lower extremity pain, status post extensive laminectomy L4-5 with postoperative scarring.

DISCUSSION: I will attempt to respond to your questions in order as follows:

1. Is he currently disabled due to this injury and it it the sole cause of his disability?

He is currently substantially disabled as a result of this injury. However, this is not the sole cause of his disability.

He injured his back in 1983 and was operated with extensive laminectomy of his low back in 1985.

2. If so, is he totally disabled or may he perform selected work?

He could do limited selected work, so is not technically totally disabled.

3. If capable of light work, what restrictions would you place on him?

He should avoid working more than four hours per day. He should avoid lifting more than 15 pounds, more than occasional bending, avoid working in tight compartments, and avoid climbing ladders. He could walk five hours per day if allowed to rest occasionally.

4. Has he reached a point of maximum medical improvement? Yes.

5. If so, when?

I believe he reached maximum medical improvement as of March 4, 1993, when Dr. Spindell described him as getting along quite well.

6. If so, what percentage of permanent functional loss of use

pursuant to the fourth edition of the AMA guidelines does he have due to this condition? Please apportion the impairment specific to the injury and the impairment attributable to the pre-existing conditions or factors.

Using as a guide The American Medical Association **Guides to the Evaluation of Permanent Impairment**, Fourth Edition, there is a permanent partial physical impairment determined as follows.

Based upon Table 75 on page 113 of the AMA Guides and based upon a surgically treated disc lesion with residual pain and rigidity, with surgery at two levels, there is an 11% whole person impairment. Based upon Table 81 and with respect to limited flexion of the lumbar spine, there is another 6% whole person impairment.

Based upon the Combined Values Chart on page 322 of the AMA Guides, the 11% and 6% impairment combine (not add) to total 16% permanent partial physical impairment of the whole person.

Using paragraph 3.3k on page 131 of the AMA Guides, this 16% whole person impairment is equivalent to 18% permanent partial physical impairment of the lumbar spine.

APPORTIONMENT: Mr. Stevens had previously been operated on and stated that he had done very well following his 1985 surgery. Using the same Table 75 on page 113, a surgically treated disc lesion without residual signs or symptoms, performed at two levels, would have produced 9% permanent partial physical impairment of the whole person. Assuming full range of motion, that total preexisting impairment, prior to September 21, 1991, was 9% whole person. Using paragraph 3.3k on page 131 of the AMA Guides, that 9% whole person impairment is equivalent to 10% permanent partial physical impairment of the lumbar spine.

Therefore, of the current 18% permanent partial physical impairment of the lumbar spine, 10% was preexisting and 8% permanent partial physical impairment of the lumbar spine would appropriately be apportioned to the injury sustained September 21, 1991.

7. Is his injury of 9/21/91 causally related to his employment at Electric Boat Corporation?

If the above history be correct, his injury of September 21, 1991, was causally related to his employment at Electric Boat Corporation.

8. Did he have any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater?

Yes. He had previously injured his low back in 1983 and had undergone spinal operation in 1985. Thus, his previous condition

and injury, when combined with the injury of September 21, 1991, did produce materially and substantially greater injury than what would have occurred from the September 21, 1991, injury alone.

9. Could you ask the claimant if he has worked in any capacity since his injury? What physical activity does he engage in?

He states that other than working at Electric Boat itself, he has not worked in any other capacity since September 21, 1991.

Currently, he states he does housework two hours per day, walks five hours per day, watches television three hours per day, reads three hours per day, and lies down 16 hours per day.

10. Would surgery be reasonable in this case?

Yes. Surgery may help his condition and has approximately a 50% chance of doing so. If it does help, I would agree with Dr. Halperin's estimate of 50% to 60% improvement in symptoms but a probability that he would not be totally asymptomatic. Since Mr. Steven has exhausted other modes of treatment and does appear to have credible back and lower extremity pain with abnormal MRI findings and discogram, surgery would be a reasonable effort to improve his condition, despite its uncertainty.

Claimant has undergone two back surgeries, the most recent on May 5, 1997 (RX 12), and he was out of work and was released to return to work with restrictions on October 31, 1998. He cannot return to work at the shipyard, and as of September 15, 1997, found much easier work as a sheet metal worker at Valley Repair doing residential sheet metal work. He works primarily as a site supervisor in charge of crews installing ventilation duct work in homes. He does very little lifting and does not have to crawl into or work in tight confined spaces in awkward positions. He has his good and bad days and his chronic low back pain is aggravated by cold and damp weather. He has learned how to work with his limitations and he works a regular forty (40) hour week. The adjusted hourly rate for that job is $7.45 (CX 16), thereby producing a wage-earning capacity of $298.00 for his forty (40) hour work week from September 15, 1997 through October 31, 1998, pursuant to Section 8(e) of the Act. (I note that the parties have not clarified that return to work date and I shall use Claimant's testimony on that issue. (TR 13)) He denied doing gardening work for four (4) daily and because of his back he can only do gardening for four (4) hours each week. (TR 31-54)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that

(1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm

necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the

evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, chronic lumbar disc syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S.**

Department of Labor, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that claimant injured his back in a relatively minor shipyard accident on September 21, 1991 while working in the sheet metal shop (RX 1), that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and paid appropriate compensation benefits to Claimant while he was unable to return to work (RX 3, RX 4), and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to

claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a sheet metal worker. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had total disability while he was unable to return to work and that he has a partial disability on and after November 1, 1998, at which time he found work through his own efforts.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General**

Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement

that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on October 31, 1998 and that he has been permanently and partially disabled from November 1, 1998, according to the well-reasoned opinion of Dr. Willetts. (RX 5-17)

With reference to Claimant’s residual work capacity and his wage-earning capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger’s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually

earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back condition and that his current employer has allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken on this issue many times and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above and the parties are in agreement as to Claimant's post-injury wage-earning capacity, **i.e.**, that his post-injury wage-earning capacity entitles him to weekly benefits at the weekly rate of $184.22, and such benefits shall begin in November 1, 1998 and shall continue until further **ORDER** of this Court. (TR 13-17; CX 16)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid

compensation benefits from the day of the accident to the present time and continuing, except when he was able to return to work at the shipyard. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982);

Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (19982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**,

542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked at the Employer's shipyard from April 6, 1980 through August 15, 1997 (RX 19), (2) that Claimant's ankle and knee injury occurred on October 11, 1984 in a serious shipyard accident while working in the fan room of the 719 Boat (RX 13), (3) that the Employer authorized treatment by Dr. A. John Elliot (**Id**.), (4) that his first back injury also occurred while working on the 719 Board on November 2, 1984. (RX 14), (5) that the Employer authorized treatment by Dr. Siciliano and Dr. Elliot (RX 10), (6) that Claimant reinjured his back on August 8, 1985 while working on the 724 Boat and the Employer authorized treatment by Dr. Siciliano (RX 10, RX 15), (7) that he reinjured his back on October 7, 1985, again on the 724 Boat, and again Dr. Siciliano was authorized to provide treatment (RX 10, RX 16), (8) that he reinjured his back on April 9, 1987 while working on a boat being constructed on the wet dock and again the Employer authorized treatment by Dr. Siciliano (RX 17), (9) that the Employer paid appropriate compensation to Claimant while he was unable to return to work at the shipyard (RX 20), (10) that Claimant's several back injuries acquired a lumbar laminectomy at L4-S1 on December 13, 1985 (RX 80), (11) that that surgery required the imposition of work restrictions, (12) that the Employer retained Claimant as a valued employee even with actual knowledge of his medical problems, (13) that he has sustained previous work-related industrial accidents prior to September 20, 1991, (14) while working at the Employer's shipyard and (15) that Claimant's permanent total and partial disability is the result of the combination of his pre-existing permanent partial disability and his September 20, 1991 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Benjamin Gilson (RX 6) and Dr. Willetts. (RX 5) **See Atlantic & Gulf Stevedores v. Director**, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd**

Shipyards, 22 BRBS 42 (1989).

Claimant's condition, prior to his final injury on September 20, 1991, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C & P Telephone Company v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on December 16, 1999 (CX 18), concerning services rendered and costs incurred in representing Claimant between April 8, 1999 and December 10, 1999. Attorney Carolyn P. Kelly seeks a fee of $2,795.75 (including expenses) based on 13.75 hours of attorney time at $185.00 per hour and 2.50 hours of paralegal time at $40.00/$45.00 per hour.

The Employer has not objected to the requested attorney's fee. (RX 21)

In accordance with established practice, I will consider only those services rendered and costs incurred after April 29, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's lack of objections on the requested fee, I find a legal fee of $2,795.75 (including expenses of $114.50) is reasonable and in accordance

with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to Claimant benefits for his temporary partial disability, pursuant to Section 8(e), based upon the difference between his average weekly wage of $574.33 and his wage-earning capacity of $298.00, and such compensation shall be paid from September 15, 1997 through October 31, 1998.

2. The Employer shall also pay to Claimant compensation for his permanent partial disability, based upon the difference between his average weekly wage at the time of the injury, $574.33, and his wage-earning capacity after the injury, $298.00, as provided by Sections 8(c)(21) and 8(h) of the Act, and such benefits shall commence on November 1, 1998 and shall continue until further ORDER of this Court.

3. The Employer's obligation herein is limited to 104 weeks of permanent benefits and after the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his September 20, 1991 injury on and after September 15, 1997.

5. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the third Order provision above, subject to the provisions of Section 7 of the Act.

7. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $2,795.75 (including expenses) as a reasonable

fee for representing Claimant herein before the Office of Administrative Law Judges between April 8, 1999 and December 10, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated: May 2, 2000
DWD:dr